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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

PEDRO DE LA TORRE-
DELGADILLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. 14-CV-1237-BEN
13-CR-2949-BEN

ORDER:

**(1) DENYING MOTION TO
VACATE, SET ASIDE, OR
CORRECT SENTENCE
PURSUANT TO 28 U.S.C. § 2255**

**(2) DENYING CERTIFICATE OF
APPEALABILITY**

[Civil Docket No. 1/Criminal Docket
No.33]

Petitioner Pedro De La Torre-Delgadillo has filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. (Docket No. 33).¹ For the reasons stated below, the Motion is **DENIED**.

BACKGROUND

Petitioner was arrested on July 14, 2013, and was later charged by information with a violation of 8 U.S.C. § 1326, Attempted Entry After Deportation. (Docket Nos. 1, 9). On September 17, 2013, Petitioner pled guilty to the sole count pursuant to a Plea Agreement with the United States. (Docket Nos. 13, 15). This Court accepted his plea on October 2, 2013. (Docket No. 18). On February 18, 2014, this Court sentenced Petitioner to 24 months imprisonment and two years supervised release. (Docket Nos.

¹All docket numbers refer to the criminal docket, 13-CR-2949-BEN.

1 28, 29).

2 Petitioner filed the instant Motion on May 15, 2014. The United States filed an
3 Opposition on July 24, 2014. (Docket No. 42). Petitioner did not file a traverse.

4 **LEGAL STANDARD**

5 A district court may “vacate, set aside or correct” the sentence of a federal
6 prisoner that was imposed in violation of the Constitution or a law of the United States.
7 28 U.S.C. § 2255(a). A district court must hold an evidentiary hearing before denying
8 a § 2255 motion, unless it is conclusively shown that the prisoner is entitled to no
9 relief. 28 U.S.C. § 2255(b). If it is clear the petitioner has failed to state a claim, or has
10 “no more than conclusory allegations, unsupported by facts and refuted by the record,”
11 a district court may deny a § 2255 motion without an evidentiary hearing. *United*
12 *States v. Quan*, 789 F.2d 711, 715 (9th Cir. 1986).

13 **DISCUSSION**

14 A. Legal Standard for Ineffective Assistance of Counsel

15 All of Petitioner’s claims before this Court pertain to allegations of ineffective
16 assistance of counsel.

17 A petitioner asserting an ineffective assistance of counsel claim must
18 demonstrate that: (1) defense counsel’s performance was deficient; and (2) this
19 deficient performance prejudiced the petitioner’s defense. *Strickland v. Washington*,
20 466 U.S. 668, 690-92 (1994). To establish performance is deficient, Petitioner must
21 show that his counsel’s representation “fell below an objective standard of
22 reasonableness.” *Id.* at 687-88. Due to the difficulties inherent in evaluating the
23 performance of counsel after the fact, a court must indulge a strong presumption that
24 counsel’s conduct falls within the wide range of reasonable professional assistance.
25 *Id.* at 689. To demonstrate prejudice, a defendant must show that there is a “reasonable
26 probability” that “but for counsel’s unprofessional errors, the result of the proceeding
27 would have been different.” *Id.* at 694. A reasonable probability is a probability
28 sufficient to undermine confidence in the outcome. *Id.*

1 B. Ground One: Failure to Advise of Constitutional Rights

2 Petitioner claims that his attorney did not advise him of the “Boykin trial rights
3 guaranteed to him by the Fifth and Sixth amendments,” and that this resulted in an
4 “unknowing and involuntary guilty plea, in violation of the due process clause of the
5 Fifth Amendment.” (Mot. at 5). He contends that he should have been advised
6 “pursuant to Rule 11 of the Federal Rules of Criminal Procedure,” and asks that this
7 Court vacate the sentence to allow the Petitioner, “if he so chooses to enter a knowing,
8 intelligent and voluntary guilty plea. . . .” (*Id.*)

9 A review of the record shows that Petitioner’s argument is without merit. First,
10 the Plea Agreement, signed by Petitioner, confirms that Petitioner fully discussed the
11 nature of the charge and the plea with his counsel. (Docket No. 15, Plea Agreement
12 at 3, 5). Petitioner explicitly waived his Fifth and Sixth Amendment rights, as stated
13 in the Plea Agreement. (*Id.* at 4). And, Petitioner affirmed that he knowingly and
14 voluntarily pled guilty. (*Id.* at 5).

15 Second, *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), requires courts to
16 determine whether a defendant entering a guilty plea (1) has knowingly and voluntarily
17 pled guilty, and (2) understands the consequences of entering a guilty plea. On
18 September 17, 2013, the Court held a Change of Plea Hearing pursuant to Federal Rule
19 of Criminal Procedure 11, which satisfied *Boykin*. During that hearing, the Court
20 clearly informed Petitioner of his rights and also explained the consequences of
21 waiving those rights. (Docket No. 44, Plea Hr’g Tr. 4:3-22, 5:4-7). Petitioner
22 affirmatively acknowledged that he understood his rights and the consequences of
23 entering a guilty plea. (*Id.* at 5:8-12). He further told the Court that he was satisfied
24 with the services of his attorney, and that he had no questions regarding the Plea
25 Agreement. (*Id.* at 9:3-8).

26 Third, on February 18, 2014, the Court held a Sentencing Hearing. The hearing
27 was yet another opportunity for Petitioner to resolve any issues he may have had, deny
28 that he had waived his rights, or withdraw his guilty plea. Petitioner did none of that.

1 Instead, when the Court asked if Petitioner agreed that he waived his right to appeal
2 and collaterally attack, Petitioner answered, "Yes." (Opp'n, Gov. Ex. 1 at 8:3-5).

3 Thus, this Court is persuaded that Petitioner's counsel informed Petitioner of his
4 Constitutional rights. However, even if Petitioner's counsel did fail to advise
5 Petitioner of his rights, and that he was waiving those rights, the result of Petitioner
6 entering a guilty plea would have remained the same because both the Court and the
7 Agreement Petitioner signed advised him of those rights. Petitioner's plea was
8 therefore made after being fully informed of his rights and the fact that he was giving
9 them up by pleading guilty. This claim is therefore denied on the merits.

10 C. Ground Two: Failure to Object to Presentence Report

11 Petitioner claims that his counsel was deficient in failing to object to the
12 underlying conviction relied upon in the Presentence Report ("PSR"). (Mot. at 6). He
13 contends that the probation officer made a recommendation based on an alleged
14 conviction for an aggravated felony, but did not identify which conviction the
15 recommendation was relied upon. (*Id.*) Petitioner also claims the probation officer
16 failed to identify the statute of conviction, or provide supporting documentation. (*Id.*)
17 He claims that the district court erred in relying on these "bare assertions" and that
18 "[b]ecause aggravated felony statutes include conduct that does not qualify as a crime
19 of aggravated felony, the district court's error affected Petitioner's [substantial] rights
20 and should be corrected."² (*Id.*)

21 Again, this Court is not persuaded by Petitioner's argument. The record
22 indicates that Petitioner's counsel did in fact object to the PSR's calculation of the
23 Guidelines by written motion, and counsel raised the issue during the sentencing
24 hearing. (Opp'n, Gov. Ex. 1 at 2:19-22; Docket No. 24, Objection to PSR).
25 Specifically, Petitioner's counsel argued that the PSR erred by finding that Petitioner's
26

27 ²Petitioner states that he is bringing an ineffective assistance of counsel claim.
28 However, to the extent Petitioner's claim might be interpreted as a challenge to this
Court's calculation and imposition of his sentence, Petitioner has waived his right to
collaterally attack his sentence. (Docket No. 15, Plea Agreement at 5, 15).

1 2010 conviction merited a 16-level enhancement. (Docket No. 24, at 2-5).
2 Additionally, the PSR made a recommendation based upon a specific conviction,
3 supported by judicially noticeable documents. (Opp'n, Gov. Ex. 1 at 2:24-3:19).

4 Even if Petitioner's counsel failed to object, the Court would have still imposed
5 the enhancement because the PSR identified the particular conviction upon which the
6 enhancement relied. Thus, Petitioner's claim fails here as well. Additionally, this
7 ground presents no basis for challenging the voluntariness of Petitioner's plea or the
8 Plea Agreement. As discussed above, Petitioner was fully informed of his trial rights
9 when he entered the Agreement and pled guilty. As the waiver is valid, Petitioner has
10 waived his right to collaterally attack this Court's sentence on grounds other than
11 ineffective assistance of counsel. This claim is therefore denied on the merits.

12 D. Ground Three: Failure to Provide Petitioner an Opportunity to Allocute

13 Petitioner claims that defense counsel was ineffective because he did not give
14 Petitioner a chance to allocute. (Mot. at 8). He asks the Court to vacate the sentence
15 to allow him to provide a "full allocution statement" because he was "not provided an
16 opportunity to speak to the Court." (*Id.*)

17 Petitioner's claim is clearly rebutted by the record. Petitioner was given an
18 opportunity to address this Court at sentencing, and made statements to the Court.
19 (Opp'n, Gov. Ex. 1 at 5:20-6:4). This Court therefore denies this claim.

20 E. Ground Four: Failure to File Timely Notice of Appeal

21 Petitioner contends that the right to counsel extends to his direct appeal, and that
22 counsel's failure to file a notice of appeal violated his constitutional rights. (Mot. at
23 9). Although somewhat difficult to understand, Petitioner apparently seeks an
24 opportunity to make a direct appeal. (*Id.*)

25 It is deficient for counsel to fail to file an appeal when requested, even if there
26 are no non-frivolous grounds for appeal or the defendant agreed to waive his right to
27 appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *United States v.*
28 *Sandoval-Lopez*, 409 F.3d 1193, 1197-98 (9th Cir. 2005).

Here, Petitioner presents no evidence of any request that Petitioner's counsel file an appeal. Nor is there any evidence from the record that supports Petitioner's claim. On the contrary, the record reveals that Petitioner was satisfied with his counsel's services (Docket No. 44, at 9:3-5), and that Petitioner knowingly waived his right to appeal. (Opp'n, Gov. Ex. 1 at 7:25-8:5).

F. Evidentiary Hearing

Petitioner is not entitled to an evidentiary hearing. *Quan*, 789 F.2d at 715 (stating where the record demonstrates that a petitioner has failed to state a claim, a district court may deny a § 2255 motion without an evidentiary hearing). It is abundantly clear that the four Grounds upon which Petitioner makes his ineffective assistance of counsel claim are refuted by the record. Petitioner failed to make any assertions or provide any evidence that suggests the contrary. Given the foregoing discussion, this Court finds that Petitioner cannot succeed upon his claims, and is entitled to no relief.

CONCLUSION

In accordance with the conclusions set forth above, Petitioner's Motion to Vacate, Set Aside, or Correct Sentence is **DENIED**.

A court may issue a certificate of appealability where the petitioner has made a "substantial showing of the denial of a constitutional right," and reasonable jurists could debate whether the motion should have been resolved differently, or that the issues presented deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003). This Court finds that Petitioner has not made the necessary showing. A certificate of appealability is therefore **DENIED**.

IT IS SO ORDERED.

DATED: October 24, 2014


HON. ROGER T. BENITEZ
United States District Judge